

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

PENNSYLVANIA NATIONAL)
MUTUAL CASUALTY)
INSURANCE CO.,)
)
Plaintiff,)
)
v.) Case No. 2:20-cv-43-GMB
)
3D AIR SERVICES, INC., and)
CHOATE CONSTRUCTION)
COMPANY,)
)
Defendants.)

MEMORANDUM OPINION

Before the court is the complaint filed by Plaintiff Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) seeking a declaratory judgment regarding its obligations to Defendants 3D Air Services, Inc. (“3D Air”) and Choate Construction Company (“Choate”) under a Commercial General Liability Policy and a Commercial Umbrella Policy. Doc. 1. In response to the complaint, both Choate and 3D Air filed motions to dismiss for lack of jurisdiction. Docs. 15 & 22. Choate’s motion contends that the court lacks personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2), and that the lawsuit is premature and the issues of law and fact are not ripe for the court’s consideration under Federal Rule of Civil Procedure 12(b)(1). Doc. 15. 3D Air’s motion similarly contends that

the court lacks subject matter jurisdiction under Rule 12(b)(1), that Penn National does not have standing to assert this action against it, and that the lawsuit is premature. Doc. 22. Pursuant to 28 U.S.C. § 636(c), the parties have consented to the jurisdiction of a United States Magistrate Judge. Doc. 31.

I. STANDARD OF REVIEW

The motions to dismiss implicate Federal Rules of Civil Procedure 12(b)(1) and 12(b)(2). Docs. 15 & 22. The primary focus of Choate’s motion is Rule 12(b)(2). Doc. 15. Rule 12(b)(2) motions test the court’s personal jurisdiction over a defendant. “A plaintiff seeking the exercise of personal jurisdiction over a nonresident defendant bears the initial burden of alleging in the complaint sufficient facts to make out a *prima facie* case of jurisdiction.” *United Tech. Corp. v. Mazer*, 556 F.3d 1260, 1274 (11th Cir. 2009) (citing *Posner v. Essex Ins. Co., Ltd.*, 178 F.3d 1209, 1214 (11th Cir. 1999)). Where, as here, the defendant challenges jurisdiction by submitting affidavit evidence in support of its position, “the burden traditionally shifts back to the plaintiff to produce evidence supporting jurisdiction.” *Meier ex rel. Meier v. Sun Int’l Hotels, Ltd.*, 288 F.3d 1264, 1269 (11th Cir. 2002). When the issue of personal jurisdiction is decided on the evidence, but without a discretionary hearing, a plaintiff demonstrates a *prima facie* case of personal jurisdiction by submitting evidence sufficient to defeat a motion made pursuant to Federal Rule of Civil Procedure 50(a). *Snow v. DirecTV, Inc.*, 450 F.3d 1314, 1317 (11th Cir. 2006).

At this evidentiary juncture, the court construes the allegations in the complaint as true if they are uncontested by affidavits or deposition testimony, *id.* at 1317, and where there are conflicts, the court “construe[s] all reasonable inferences in favor of the plaintiff.” *Whitney Info. Network, Inc. v. Xcentric Ventures, LLC*, 199 F. App’x 738, 741 (11th Cir. 2006) (quoting *Meier*, 288 F.3d at 1269).

The motions also invoke the court’s subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Docs. 15 & 22. Subject matter jurisdiction is the statutorily conferred power of the court to hear a class of cases. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 503 (2006). Motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) take two forms: “facial attacks” and “factual attacks.” *Lawrence v. Dunbar*, 919 F.2d 1525, 1528–29 (11th Cir. 1990). “Facial attacks challenge subject matter jurisdiction based on the allegations in the complaint, and the district court takes the allegations as true in deciding whether to grant the motion. Factual attacks challenge subject matter jurisdiction in fact, irrespective of the pleadings. In resolving a factual attack, the district court may consider extrinsic evidence such as testimony and affidavits.” *Morrison v. Amway Corp.*, 323 F.3d 920, 925 n.5 (11th Cir. 2003).

III. FACTUAL BACKGROUND

This lawsuit concerns insurance coverage for claims alleging defects in the construction of a student apartment complex in Charlotte, North Carolina. Doc. 1-5

at 4. Choate, a Georgia corporation with its principal place of business in Georgia, served as the general contractor for the complex. Docs. 1 at 1 & 1-5 at 5. According to Choate’s Director of Operations, Choate does not have any offices, employees, or assets in Alabama and does not regularly engage in business in Alabama or solicit work in Alabama. Doc. 17-1 at 5. Even so, Choate is registered and authorized to do business in Alabama (Doc. 35-1) and has worked on six construction projects in Alabama during its 31-year history as a business, with its most recent projects in 2010 and 2012. Doc. 17-1 at 5. Choate maintains that its other “contacts with Alabama have been limited to hiring subcontractors from time to time that happen to be located in Alabama,” but who are contracted for work to be performed outside of Alabama. Doc. 17-1 at 5.

A. The Subcontract Between Choate and 3D Air

The apartment complex developer was familiar with 3D Air, an Alabama company with its principal place of business in Alabama, and encouraged Choate to obtain a bid from 3D Air for work on the project. Docs. 17-1 at 3-4 & 48-1 at 2. Choate obtained a bid from and selected 3D Air as the subcontractor for the heating, ventilation, and air conditioning (“HVAC”) work on the project. Doc. 17-1 at 3-4. There were numerous phone calls, emails, and fax communications between Choate and 3D Air relating to the negotiation of the subcontract. Docs. 48-1 at 2-3, 48-3, 48-4, 48-7 & 48-8. On Choate’s end, the negotiations with 3D Air were all in

Georgia—there were no in-person meetings and no Choate employee set foot in Alabama in connection with the subcontract negotiations. Doc. 53-1 at 7. The subcontract states that Georgia law governs any disputes arising from the contract and requires arbitration of those disputes in Atlanta, Georgia. Doc. 17-1 at 4; Doc. 1-15 at 2 & 26.

The subcontract required 3D Air to procure insurance from a carrier authorized to do business in North Carolina and to name Choate as an additional insured. Doc 17-1 at 4. And the subcontract dictated a number of specific terms with respect to the insurance coverage, including but not limited to:

- the Best's rating of the insurer;
- that the coverage forms must be acceptable to Choate;
- to whom coverage must be afforded under the policy;
- the duration of the coverage;
- the limits of the coverage both primary and excess;
- the inclusion of completed operations coverage;
- how the aggregate limits must be applied to the project;
- the precise Commercial General Liability Coverage Form required;
- a limitation of exclusions permitted;
- that Choate and its officers, directors,⁷ and employees and the project owner must be included as additional insureds under both the primary and excess policies for both ongoing and completed operations;
- the particular ISO Additional Insured Endorsements to be attached to the Alabama policy;
- that the coverage afforded to Choate by its required ISO Additional Insured Endorsement be primary, non-contributing coverage for Choate;
- the amount of the deductible or self-insured retention allowed;
- waiver of the insurer's subrogation rights; and
- the substance of the cancellation provisions.

Doc. 17-1 at 20–22. Choate was not involved in selecting the insurance carrier and did not negotiate the terms of the policy or pay any of the premiums. Doc. 17-1 at 4. However, Choate received the certificates of insurance from an Alabama insurance broker and had multiple communications with the Alabama insurance broker and 3D Air concerning the coverage and the issuance of the certificates of insurance. Docs. 17-1 at 73–75, 48-1 at 4–7, 48-8, 48-9, 48-10, 48-11, 48-12 & 48-13.

B. The Underlying Lawsuit

On March 16, 2018, the apartment developer’s assignee filed a complaint in North Carolina state court against Choate and others alleging defects in construction, design, and workmanship, including problems with the HVAC system installed by 3D Air (“the underlying lawsuit”). Doc. 1 at 3; Doc. 1-5 at 8 & 19–23; Doc. 1-15. The plaintiffs asserted claims against Choate for breach of warranty and for conspiring to conceal defects in the HVAC system. Doc. 1-5 at 5, 28–29 & 36. 3D Air is not a party in the underlying lawsuit. The state court ordered the plaintiffs’ claims against Choate to arbitration, and the parties have been conducting discovery. Doc. 17-1 at 6. Penn National is defending Choate in the underlying lawsuit under a reservation of rights. Doc. 1 at 5. In its complaint in this court, Penn National seeks a determination of whether it has a duty to defend or indemnify Choate in the underlying lawsuit. Doc. 1 at 10 & 23–28. The complaint does not state a cause of action against 3D Air.

IV. DISCUSSION

As discussed above, before the court are two motions to dismiss. Docs. 15 & 22. Although some of the arguments overlap, the court begins with Choate’s motion to dismiss and then addresses 3D Air’s motion. For the following reasons, the court finds that both motions are due to be granted.

A. Choate’s Motion to Dismiss

Choate advances two alternative arguments in favor of dismissal. Doc. 15. It first contends that this court lacks personal jurisdiction over it. Doc. 15 at 2–4. Second, Choate asserts that—even if jurisdiction exists—the declaratory judgment complaint is due to be dismissed because the claims are not ripe. Doc. 15 at 5–6. Because the court agrees that it lacks personal jurisdiction over Choate, it does not address the ripeness of this dispute.

In a diversity action, the court “undertakes a two-step inquiry in determining whether personal jurisdiction exists: the exercise of jurisdiction must (1) be appropriate under the state long-arm statute, and (2) not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.” *United Techs. Corp.*, 556 F.3d at 1274. Because Alabama’s long-arm statute “permits its courts to exercise jurisdiction over nonresidents to the fullest extent allowed under the Due Process Clause of the Fourteenth Amendment to the Constitution,” *Ruiz de Molina v. Merritt & Furman Ins. Agency, Inc.*, 207 F.3d 1351, 1355–56 (11th Cir.

2000), the court need only consider whether the exercise of jurisdiction satisfies the requirements of due process. *Olivier v. Merritt Dredging Co.*, 979 F.2d 827, 830 (11th Cir. 1992). The due process requirements in this context are (1) that the defendant have “certain minimum contacts” with the forum state, and (2) if such minimum contacts exist, that the exercise of jurisdiction over the defendant “does not offend traditional notions of fair play and substantial justice.”” *Burnham v. Sup. Ct. of Cal.*, 495 U.S. 604, 618 (1990) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). “This two-part test embodies the controlling due process principle that a defendant must have ‘fair warning’ that a particular activity may subject it to the jurisdiction of a foreign sovereign.” *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1545 (11th Cir. 1993).

The Due Process Clause allows for two types of personal jurisdiction: general and specific jurisdiction. *Bristol-Myers Squibb Co. v. Sup. Ct. of Cal., San Francisco City*, 137 S. Ct. 1773, 1780 (2017) (citing *Goodyear Dunlop Tire Ops., S.A. v. Brown*, 564 U.S. 915, 919 (2011)). For either general or specific jurisdiction to comport with due process, the defendant must have certain minimum contacts with the state, and the “minimum contacts inquiry focuses on ‘the relationship among the defendant, the forum, and the litigation.’” *Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1312 (11th Cir. 2018) (quoting *Walden v. Fiore*, 571 U.S. 277, 284 (2014)). “This inquiry ensures that a defendant is haled into court in a forum state based on